IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SPOKANE & EASTERN TRUST COMPANY,

Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY,

Appellee.

No. 3983

Appeal from District Court, Eastern District of Washington

APPELLANT'S REPLY BRIEF

F. H. GRAVES
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B. H. KIZER,
Spokane, Washington
Solicitors for Appellant.

EMPIRE-PACIFIC PRINTING CO., SPOKANE

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I.

The Primary Question for Decision.

Plaintiff's counsel asserted in oral argument that there was no question of law involved in this case. That depends upon whether the case is decided upon suspicion and denunciation, as counsel would have it, or whether it is decided by the application of settled principles of law to the facts established by the evidence. If the latter, there lies at the threshold of the case, beyond which there is no passing until the question is decided, the question whether the Central Bank was plaintiff's trustee or its debtor with respect to the proceeds of the collection involved. If the Central Bank was merely plaintiff's debtor, certainly there can be no recovery in this case, for in that event no trust fund came into the hands of the Trust Company, and no matter what the relations between the Central Bank and the Trust Company, nor the circumstances under which the money was received by the Trust Company, plaintiff cannot recover it.

To sustain its claim that the Central Bank was plaintiff's trustee of the proceeds of the collection and not its debtor therefor, it is first said that by virtue of an express agreement between the two the title to the check and its proceeds remained in plaintiff. The statement is unsustainable. There was no express agreement with respect to the manner of the collection, or regarding the title to the check and its proceeds, and the question of where that title was at

the time of the insolvency of the Central Bank depends upon the custom of banks in making collections such as that here involved. These are the material facts: Plaintiff deposited the check with the Seattle National Bank, its Seattle banker, just as it would money, receiving credit therefor. Under the fundamental law governing such deposits, plaintiff thereby parted with its title to the check and vested it in the Seattle National Bank. The deposit slip, however, contained a stipulation that out of town items would be collected through agents, for whose defaults the Seattle National Bank assumed no responsibility, and that if there was a failure to receive the proceeds of the collection due to the default of any sub-agent, then the items previously credited would be charged back to the depositor's account (Tr., 33). Plaintiff knew, therefore, not only from the deposit slip but from the custom of banks, of which it was charged with notice, *Bowman v. Bank,* 9 Wash., 614, that the check would be sent to another bank for collection and the collection made in accordance with banking customs. If it did not desire the collection to be made in that manner, it should have made some express agreement to the contrary. *Hallam v. Tillinghast,* 19 Wash., 20. It made no such agreement and did nothing but deposit the check as a general deposit to its credit, and so must be held to have intended that the check should be collected in accordance with the usual custom. The Seattle National Bank made its Yakima collections through the Central Bank. It therefore placed plaintiff's check with a number of other checks

on Yakima banks which it held and sent them all to the Central Bank. It was intended that the collection should be made in the customary manner, for it gave no special direction respecting the matter. The checks bore the "regular endorsement stamp for collection of out of town items," were enclosed in the "regular cash remittance letter," and this letter, as its face shows, was a form letter used in all such cases (Tr., 33-34). When the Central Bank received the checks it proceeded to collect them in the usual manner. As it was not a member of the Yakima Clearing House, collections for and against it were made through the Yakima Valley Bank. The procedure, as illustrated by the business of the 21st, the day the check in question was collected, was as follows: The Central Bank took the checks it had received from the Seattle bank, placed them with a number of other checks drawn on Yakima banks which it held for collection, the total of which aggregated over $58,000, and deposited them with the Yakima Valley Bank, receiving credit therefor just as though a general deposit of money had been made, and of course establishing between the Central Bank and the Yakima Valley Bank the same relation with respect to the checks that is established between any depositor and any bank when he makes a general deposit with the bank. The checks deposited were all collected by the Yakima Valley Bank on the 21st. On the same day, however, checks against the Central Bank amounting to some $9,000 were presented to and paid by the Yakima Valley Bank. The result of the day's trans-

actions was that out of its deposit of $58,000 in the morning, the Central Bank had a credit of $49,500 remaining with the Yakima Valley Bank in the evening, the remainder of the deposit having been used in paying the debts of the Central Bank, *i. e.*, checks drawn upon it and presented for payment to the Yakima Valley Bank (Tr., 36-40). The Central Bank then withdrew $48,000 of this deposit in the form of two drafts, one on a Tacoma bank and one on a Spokane bank, leaving a deposit of $1,500 with the Yakima Valley Bank. It sent the drafts, together with some small items derived from other sources, to the Trust Company for credit. It then drew a draft upon the Trust Company for $51,000, the total amount of the checks collected for the Seattle National Bank, and sent the draft to that bank. The latter accepted the draft without question and in due course presented it for payment to the Trust Company. No objection was made to the manner of collection until payment of the draft was refused.

While the matter is not relevant to the legal question involved, we digress to reply to the insinuation made in brief and oral argument that had the usual and proper course of business been observed, the $48,000 drafts would have been sent directly to the Seattle bank, accompanied by a sufficient amount in other funds to cover the amount of the checks collected, and that it was unusual to send them to the Trust Company for credit and to draw a draft upon it in settlement of such collections. The falsity

of the insinuation is established by the record. Lemon, an officer of the Central Bank and a witness for plaintiff, testified that the manner of making the collection and remitting therefor was in accordance with bank custom; the custom prevailing in banks generally, the custom universally followed in dealings between the Seattle National Bank and the Central Bank (Tr., 41-42). The Central Bank carried no account with the Seattle National Bank. It did have an account with the National City Bank of Seattle, but it was not such an active account as that with the Trust Company. Ellis, cashier of the Central Bank, and also a witness for plaintiff, testified that the $48,000 drafts were sent to the Trust Company for credit because "it was the principal and drawing correspondent, and the only time the Central Bank didn't use them in the ordinary course of business was in the extreme East or in California"; that sending the drafts to the Trust Company for credit and drawing upon it in settlement of the collections was in the regular and orderly course of business and as business had always theretofore been transacted between the Seattle National Bank and the Central Bank (Tr., 96-98). Furthermore, it was proven that between the 14th and the 27th of January—the collection for plaintiff was made on the 21st—the Central Bank made collections for the Seattle National Bank amounting to about $100,000, and that in every case settlement therefor was made by drafts drawn upon the Trust Company, and that these transactions were typical of similar transactions occurring for some months prev-

ious (Tr., 140-141). Inasmuch as none of this evidence is disputed or questioned, counsel are scarcely frank in insinuating that the particular transaction was out of the ordinary and improper.

Now as it was intended that the collection should be made in accordance with the banking custom, in the manner in which all out of town collections are made by all banks, and as it was so made, it must be held that when the collection was made the Central Bank took title to the proceeds and was plaintiff's debtor therefor if the cases of *Bowman v. Bank,* 9 Wash,, 614, and *Hallam v. Tillinghast,* 19 Wash., 20, are followed. Those cases are not distinguishable from this, and counsel virtually so admit, seeking to avoid their effect merely by the claim that they should not be followed. But they must be followed unless well settled principles regarding the weight to be given state decisions in Federal courts in cases like this are disregarded. Plaintiff is domiciled and engaged in business in Washington. The other parties are citizens of that State. The transaction involved originated and was completed within that State. Moreover, Washington has a banking code under which possession of the assets and settlement of the affairs of insolvent banks are confided entirely to the State Banking Department. That Department, guided by the decisions of the courts, must pass upon the conflicting claims of general creditors and of those who present claims as *cestuis que trustent.* If this Court should in this case establish a rule contrary to that declared

in the *Bowman* and *Hallam Cases* the Banking Department must, in the future, fit its decisions upon such claims to the amount involved and the citizenship of the claimant. If these be such that the Federal Courts will have jurisdiction of the controversy, the Department would need follow the rule declared by this Court; otherwise it would be required to follow the rule of the *Bowman* and *Hallam Cases*. Such a situation ought not, of course, to be permitted. This Court has unvaryingly held that where a transaction was local to a given state, and the state courts had determined what the effect of the transaction was, their decision ought to be followed by the Federal courts, albeit the question was one of general rather than local law, in order that any unseemly conflict in the decisions of the courts should be avoided, unless, of course, the decision of the state courts was opposed to both reason and authority. *Old Colony Trust Co. v. Tacoma,* 230 Fed., 389; *Columbia Digger Co. v. Sparks,* 227 Fed., 780; *American Surety Co. v. Bank,* 254 Fed., 54. Its rulings in that respect conform to the decisions of the Supreme Court. *Union National Bank v. Bank of Kansas City,* 136 U. S., 233; *Ethridge v. Sperry,* 139 U. S., 267; *Bamberger v. Schoolfield,* 160 U. S., 149. Furthermore, there is presented a question of title to property within the State of Washington. Plaintiff asserts that the title to the check and its proceeds remained with it and that therefore the Central Bank was its trustee. The defendant asserts that title to the check and its proceeds passed to the Central Bank, and that therefore it was

merely plaintiff's debtor. Quite obviously the Court is required to say whether what occurred was sufficient to pass the title to personal property, and it is certainly beyond dispute that where a question of the transfer of title to property is involved the decisions of the courts of the state where the transaction occurred are controlling. *Lloyd v. Fulton,* 91 U. S., 479; *Dooley v. Pease,* 180 U. S., 126; *Bryant v. Swofford Bros.,* 214 U. S., 279. This Court has held that when the question was whether a chattel mortgage was fraudulent and void as to attaching creditors, it would follow the decisions of the courts of the state where the property was situated in determining the question. *Scandinavian-American Bank v. Sabin,* 227 Fed., 579. It is universally held in the Federal Courts that where questions involving property rights are involved, *e. g.,* the validity and extent of a pledge, the rights of a conditional sale vendor, the validity of trust receipts as security, etc., etc., they are to be determined in accordance with the decisions of the courts of the state where the property was situated. *Atherton v. Beaman,* 264 Fed., 878; *First Nat'l Bank v. Bank of Waynesboro,* 262 Fed., 754; *In re Richheimer,* 221 Fed., 16; *In re Bettman-Johnson Co.,* 250 Fed., 657.

But disregard, if you please, the decisions of the Supreme Court of the State. The question is controlled by *Commercial Bank v. Armstrong,* 148 U. S., 50. Plaintiff's counsel make an involved argument in attempted distinguishment of that case which we are unable to follow. We do not feel it necessary to over-

exert ourselves in endeavoring to do so because the case is simple and its principle beyond confusion. It was there squarely held that when one bank sent commercial paper: checks, darfts, etc., to another bank for collection, the relation between the two was that of principal and agent until the collection was made, but that as soon as the collecton was made, title to the proceeds was in the collecting bank and the relation between them changed from that of principal and agent to that of creditor and debtor. The case differs from the present in only one particular: that here the remittance for the collections was expected to be made as soon as the collections were effected, while in the cited case it was agreed that the proceeds of the collections might be held for ten days before remitting. That does not affect the principle involved. If by the custom of banks the collecting bank is expected or permitted to mingle the proceeds of a collection with its own funds and make remittances from the commingled fund instead of transmitting the very money collected to the owner of the collection, then the relation arising when the collection is made is not that of trustee and *cestui que trust,* but of debtor and creditor. The decisive factor is the exercise of ownership by the collecting bank over the proceeds of the collection and the mingling of the funds collected with its own funds. If this is expected or permitted, then the collecting bank is a debtor for the proceeds of the collection, but not a trustee thereof. Now, whether the time that the collecting bank exercises ownership over the money collected and holds that

money as a part of its own funds is a matter of hours or of days is immaterial. The Supreme Court said in the *Commercial Bank Case* that "the fact that the intervals between the dates for remitting were brief, is immaterial. The principle is the same as if the (collecting bank) was to remit only once every six months." Every argument that can be made for distinguishing the *Commercial Bank Case* from the present was made and answered in *First Nat'l Bank v. Davis* (N. C.), 19 S. E., 280, and upon the reasoning contained in that opinion we are content to rest.

But one word more respecting the effect of the state decisions. In *Sim v. Edenborn*, 242 U. S., 131, suit was brought to avoid and rescind a contract claimed to have been induced by misrepresentation. It was held below that the complainant could not recover because he had not offered to restore the *status quo*, the Circuit Court of Appeals declining to follow the decisions of the state court that the complainant in such a case could recover without offering restoration. The Supreme Court reversed the ruling of the Circuit Court of Appeals, saying that the decision of the state court upon such a question ought to have been followed where the transaction occurred in the state, at least where the conclusions of the state court "are not in direct conflict with any declared views of this court and some expressions in our former opinions tend to support them." Whether or no the *Commercial Bank Case* is technically distinguishable from the present case, it is certainly beyond dispute

that the decisions in the *Commercial Bank Case* and in the *Bowman* and *Hallam Cases* are closely akin, and that so far from the decision in the *Commercial Bank Case* being in conflict with the decisions in the *Bowman* and *Hallam Cases* there is very much in that case tending to support the conclusions of the other cases. Inasmuch as a rule of property is involved, and the question is whether under the circumstances the title to personal property in the State of Washington passed from plaintiff to the Central Bank, the decisions of the Washington courts should be followed.

It is said in plaintiff's brief that the Washington decisions cited are opposed to the weight of authority, and a number of decisions are cited to sustain the assertion. Space does not permit that we remark upon each cited case, although after reading them it will be seen that all, or substantially all, are distinguishable. We take for remark only the decision of this court in *Titlow v. McCormick,* 236 Fed., 209. The manner in which counsel refer to the transaction involved in that case gives the impression that it was similar to the transaction involved here. The fact is to the contrary. In that case the owner of warrants issued by a school district left them with a bank for collection. There was no general deposit of the warrants, and the transaction plainly involved merely a special deposit, and under the fundamental law governing deposits title to such a deposit does not pass to the bank. Neither was it a case where a question of the custom of banks was involved; such a ques-

tion as is presented in the present case and in every case where one bank sends commercial paper, checks, drafts, etc., to another bank for presentation and collection. Under these circumstances it is readily to be seen why it was that the *Commercial Bank Case* was neither cited by counsel nor referred to by the Court. The *Commercial Bank Case* turns, as a reading of the opinion at once discloses, upon the custom of banks in making collections of commercial paper, and it is upon that same custom that the decisions of the Supreme Court of Washington turn. The *Titlow Case* is plainly irrelevant to any question involved in this case. A reading of the remainder of the cases cited by counsel will show them to be equally irrelevant.

Some importance is sought to be attached to the fact that no debit and credit entries were made upon the books of either the Seattle National Bank or the Central Bank respecting the collection transaction, memoranda merely being kept to show that the collections had been sent and received and showing the course thereof. That that is an immaterial circumstance was held in *First National Bank v. Davis,* 19 S. E., 280, where it was said that "the manner of keeping the account was immaterial—a mere matter of bookkeeping." The important thing, as there held, was that it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc. sent it as its own in its daily transactions. There can be no question of the manner in which the Central Bank treated these checks. They were deposited as its prop-

erty with the Yakima Valley Bank and their proceeds were used in paying its debts; not only in paying the $9,000 on checks which were presented against it through the Clearing House on the 21st, but in the payment of prior drafts drawn upon the Trust Company. Under the custom of banks there could be no doubt that it was expected that it might do so.

As a makeweight it is suggested that unless a collecting bank receives actual money for a collection it remains trustee of the sender. The notion is fantastic. Banks make payments from one to the other by checks or drafts, not coin. Under the decisions in the *Commercial Bank, Bowman* and *Hallam Cases,* all that is necessary to transmute the relation between the sender and the collector from that of principal and agent to that of creditor and debtor, is that the collector shall have received money or its representative in payment of the collection, and has thereupon mingled what is received with its general funds and used it as its own. Plaintiff's check, merged with a number of other checks, was deposited by the Central Bank to its credit with the Yakima Valley Bank. From the proceeds of all those checks, an indivisible mass, was paid $9,000 in debts of the Central Bank: checks drawn upon it and presented to the Yakima Valley Bank. Of the remainder, $1,500 was left on deposit with the Yakima Valley Bank, and presumably used in paying debts of the Central Bank, while $48,000 was sent to the Trust Company for general deposit to the credit of the Central Bank. That money was used to extinguish an ex-

isting overdraft of the Central Bank, to pay drafts drawn by it, and, finally, to pay a part of its debt to the Trust Company. Obviously there was a collection of plaintiff's check which, to look no further than the *Commercial Bank Case,* changed the relation of principal and agent to that of creditor and debtor. There is no hint to the contrary in the cases cited by plaintiff.

But it is said that in any event the insolvency of the Central Bank when it made the collection forbids that it be accounted plaintiff's debtor, and requires that it be held as trustee.

Both law and facts are distorted in plaintiff's presentation of this point. It is said, in effect, that if the Central Bank was in fact insolvent, and if its officers suspected that it was so, or by the exercise of care and good judgment might have known that such was its condition, such fraud existed as would warrant holding it as plaintiff's trustee. The law is not so. Though the Central Bank was insolvent, and was known by its officers to be so, yet if they in good faith believed or hoped that it might surmount its difficulties and continue in business for some indefinite period, there was no fraud and no ground for holding it as plaintiff's trustee. "There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided." Where such is the case fraud cannot be imputed.

McDonald v. Chemical Nat. Bank, 174 U. S., 610. "A trader * * may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent." The transactions of banks under such conditions are honest, "and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their business transactions." *Quin v. Earle,* 95 Fed., 728. Now, what caused the failure of the Central Bank? Counsel portray it as due to a loss of public confidence, resulting in a run upon it. That is not so. The evidence is undisputed that it was caused by the deflation period, the steady withdrawal of deposits resulting therefrom, and inadequacy of liquid assets upon which money could be immediately realized. True, Ellis says there was "something of a run on the bank during the first two or three days of January" (Tr., 94). But disaster did not result therefrom. Whatever of flurry there was passed, and conditions became again as nearly normal as they could be said to be during the deflation period. Thus, from November, 1920, to the 3d January, 1921, there was a loss in deposits of $152,000. From the 3d to the 21st the loss was $83,000, and this loss was not heavy nor constant, being attended with fluctuations and never exceeding a few thousands on any day (Tr., 83-84). The State bank examiner testified that the peak of the deflation period was reached about the time of the failure of the Central Bank; that while it was in progress deposits dropped, pressure for cash became acute, and

banks became interlocked with each other for exchange and cash; that the larger banks were dependent upon the Federal Reserve system and the smaller banks upon the larger (Tr., 60). It may be remarked that the Trust Company lost about $5,000,000 in deposits during 1920, and $1,500,000 during January, 1921 (Tr., 105). It is apparent, then, that during January, 1921, whether any bank could be said to be solvent depended, first, on how long the deflation period would continue with resultant withdrawals of deposits, and, second, upon the liquidity of its assets. The first, no man could foretell; the second was a matter of individual opinion, which would vary according to the extent of the information of the individual, and with his inclination to optimism or pessimism.

Now, when a bank's failure is not due to over-loans, or to concealed peculation or kindred dishonesty—nothing of which is present in this case—but to a gradual shrinkage of deposits and inability of borrowers to pay because there is no market for their produce, the question of solvency or insolvency must in the nature of things be a doubtful one down to its last moments. The State bank examiner examined the Central Bank in June, 1920, six months before its failure. Apparently he then considered it to be in good condition, for nothing to the contrary is hinted. In December the examiner requested Barghoorn to make a change in the management. This was not because the Bank was thought to be in an unsafe condition, but because Ellis was not considered a good

banker, and it was thought that a firmer man, better acquainted with loans and of a more conservative disposition, ought to be in charge during the deflation period (Tr., 62-65). To this may be added that the examiner saw no reason for taking over the Central Bank on the 26th, the day before it closed, and that he believed, even in the light of subsequent events, that with outside assistance of $100,000 it would have survived (Tr., 63-64, 66).

Turning to the officers of the bank, there is no pretense that Mr. Barghoorn was well or at all informed concerning the character of the Bank's assets. That he knew the Bank was contending with a cash shortage may be admitted, but there is no reasonable ground for urging that he knew the Bank's condition to be even serious. The bank examiner, who went with Mr. Barghoorn from Spokane to Yakima on the night of the 25th, after it was known that payment of the $51,000 draft would be refused, testified that he "believed Barghoorn had no suspicion whatever that the bank was going to have to close, that while he was cognizant of the danger of a cash shortage, he didn't question the worth of his assets" (Tr., 64). Under redirect examination by plaintiff's counsel he testified that Barghoorn's attitude "was more that of fearing a collapse of the credit of the bank and an apprehension over being able to provide cash for the situation, rather than a fear of the intrinsic worth of his assets" (Tr., 65-66).

So far as Ellis is concerned, the testimony of the

bank examiner sufficiently shows his character. The dissatisfaction of the Banking Department with Ellis and the final request that he be removed came from these things: that in a great many cases he was ignorant of the facts concerning a loan; that he was an optimist; that he was indisposed to contract, but rather inclined to go out and get business with the inducement of making a loan; that his manner of keeping accounts was slovenly; that he over-estimated the resources of the Bank, and was prone to extend credit rather than contract; that he was an optimist and judged the worth of his loans by capitalizing prices when they were at their peak and expecting liquidation of his paper on these prices, and that "a man of far sterner stuff" than he should be in charge of the Bank during the liquidation period (Tr., 62, 65). It is clear that a man of Ellis' type could not see failure as certain and imminent until the examiner told him the Bank must be closed.

With respect to the Buckholtz letters, if they were to be judged by the fragments which counsel have quoted from them it might be imagined that he at least knew the Bank's condition was hopeless. But the letters must not be so judged. They must be read as a whole if they are to serve as a test of his frame of mind. So read, it will be seen that never, until the very last, did he believe the situation to be hopeless. Those letters show the cause of the Central Bank's troubles. They show there was a steady withdrawal of deposits in progress due to the general deflation and

the inability of the bank's customers, horticulturists, agriculturists, and those dependent upon those industries, to realize from their crops and produce. From the same causes, collections were very difficult, and it was a case of turning and twisting to raise the necessary cash to meet the daily withdrawals and keep up the required reserve. But through all these letters there runs a vein of optimism, and again and again the expectation is expressed that the Bank in a very short time will be able to take an upward turn and begin the payment of its indebtedness. The resources looked forward to for the bettering of conditions were, first, the improvement of market conditions which would permit of the disposal of crops and produce, stop deposit withdrawals, and make collections easier. The bankers and business men of Yakima were agreed that this condition must come very soon, certainly during February and March. The second avenue of relief was the $50,000 deposit of county funds which was expected about the 1st of February. The third was a proposed sale of the Bank, under the terms of which, in some manner not appearing in the letters, additional funds were to come into the Bank. The fourth and final resource was the continued rediscounting of paper by the Trust Company. We have remarked in our opening brief that Buckholtz' letters to the officers of the Trust Company were of the frankest, and that they stated the unfavorable conditions prevailing and to be dealt with in their worst aspect. At the same time, however, these letters leave no doubt that Buckholtz not only saw avenues of relief for the Central Bank,

but to the last believed that it would survive. In a letter written to Mr. Rutter on the 23d, two days after the collection was made and on the same date as the letter to Mr. Rutter in which he told of the outstanding $51,000 draft and expressed the opinion that the Central Bank would fail if the draft were not paid, he enclosed a list of loans which he thought could be collected in full during the next 90 days, aggregating $150,000, and told of partial payments from which an additional $50,000 could be realized, saying that while Ellis' estimate of the amount which would be realized in that way ran very much higher than his, as he had in some instances discounted Ellis' notions by 50%, he believed his own ideas to be conservative and that collections to that amount could be looked for within the time stated (Tr., 222-223). It is true that on the same day he wrote a longer letter and one of more discouraging tone to Mr. Rutter. But in that letter also he speaks of many resources which will relieve the Central Bank from its difficulties and carry it over. So far from indicating knowledge that the situation of the bank was hopeless, or even that it was in a desperate situation, he says in this letter that business men and bankers are confident of a good movement of crops and produce during February and March and running into April, and that while he has not totaled up the exact figures on the loans based on each commodity and the probable liquidation thereof, yet that "if deposits keep up to where they are, or nearly so, enabling us to keep up a reserve, I feel justified in making the statement that I am still confident of cutting down our borrowed

money to a nominal amount, if not entirely, during the next 90 days" (Tr., 229). Reading those letters as a whole, therefore, and not accepting the misconception which would be created by accepting the fragments from them which are quoted in the plaintiff's brief, it is apparent that Buckholtz never, until the last, thought the condition of the Bank desperate.

Space will not permit that we go through plaintiff's brief and correct the many inaccuracies of statement concerning the situation under discussion which are found therein. We must content ourselves in the main by again begging the Court to read this correspondence in its entirety, for if this is done these inaccuracies will be exposed. There are one or two, however, that are so flagrant that we must remark upon them. Thus, on page 58 of the brief, it is said that on the 21st, the day that the collection involved was made, the Trust Company and its representatives were aware that the last ray of hope for the Central Bank had gone glimmering and that further effort was futile, saying that this is confirmed by the fact that "all effort to provide further funds was then and there discontinued." Counsel are ill advised in making such a statement. On the 21st, 23d and 24th, Buckholtz wrote to Mr. Rutter and Mr. Triplett suggesting various plans for providing additional funds if they should be needed and requesting to be advised if these would be forthcoming (Tr., 219-237). In one of these letters Buckholtz spoke of applying to "Herb" (Herbert Witherspoon, an officer of the National City Bank of

Seattle) for permission to withdraw $30,000 in Liberty Bonds which the Central Bank had pledged with the National City Bank, and ask him to accept real estate notes and mortgages, good but slow, in lieu thereof. Replying to this letter on the 24th, Mr. Triplett said that "Herb" ought to be willing to help out the Central Bank in that way, but that if he was not the Trust Company would advance $30,000 to take up the note with the National City Bank, thus enabling the Central Bank to sell the Liberty bonds then pledged with the National City Bank. To secure this additional loan, the Trust Company offered to take the note of the Central Bank secured by collateral of good but slow paper. This proposition never came to anything as the situation became acute before it could be acted on. The letters show, however, how inaccurate is counsel's statement above referred to.

In the same connection it is said that from the 21st on there were no new rediscounts and no further effort to provide funds for the Central Bank. Yet it appears that on the 21st the Central Bank remitted to the Trust Company for rediscount $5,775 in notes; on the 22nd, $500; on the 24th, $6,400; and on the 26th, $4,900 (Tr. 139). True, the balance did not change in that time because the proceeds of such remittances, together with the cash remittances made, were used in paying drafts drawn by the Central Bank upon the Trust Company. The fact remains, nevertheless, that there was not an abandonment of all efforts to provide further funds for the Central Bank.

The most complete rejoinder to the assertion that on the 21st it was known to all concerned, including therein the Trust Company, that the last ray of hope had gone glimmering and that it was useless to attempt to save the Central Bank, is found in the fact that the Trust Company continued to pay all drafts drawn upon it by the Central Bank down to the 26th, when the $51,000 draft was presented. If on the 22nd, when the Trust Company received the $48,000 cash remittance from the Central Bank, it had known or believed that the condition of the Central Bank was hopeless and that it was futile to endeavor to provide further funds for it, would it not then have refused to pay further drafts and applied the cash it had in hand to the indebtedness of the Central Bank to it? It did not do so, but on the contrary continued to pay drafts drawn upon it by the Central Bank as they were presented until it had paid out thousands of dollars and would have had to permit a $27,000 overdraft in order to pay the $51,000 draft sent to Seattle. That circumstance speaks for itself and shows the inaccuracy of the statement that it was known days before the culmination of the troubles of the Central Bank that its situation was hopeless.

To return to the law of the matter. By reference to the authorities cited in our opening brief it will be observed that while the officers of a bank have "hope" (174 U. S., 618), "honest hope" (95 Fed., 732), "reasonable hopes" (201 Fed., 54), of surviving the "financial storm" or the known insolvency with which the

bank is contending, fraud cannot be imputed because they continue to conduct business in the usual manner and enter into the usual engagements of banks. Since our opening brief was written there has appeared in the reports a decision in a case in which were involved all the facts, and more, which appear in the case at bar, and which are said by plaintiff's counsel to fix fraud upon the Central Bank in undertaking the collection of plaintiff's check. That decision is *Steele v. Allen* (Mass.), 134 N. E., 401. Beginning in July, 1916, and running through to September, 1919, the bank whose affairs were there dealt with failed to maintain the required legal reserve for the greater part of the time. In October and November, 1919, conditions bettered, deposits increased, and the required reserve was exceeded. Then a steady decline in deposits began, interrupted occasionally by temporary increases, and from thence on the legal reserve was "almost never equalled." In April, 1920, it was discovered that through the misconduct of the treasurer excessive loans had been made to and large overdrafts suffered by a single depositor. The treasurer resigned, and to tide over the situation a number of the directors gave their notes, aggregating $125,000, to the bank. Because of the steady shrinkage of deposits, and the large amount of slow and doubtful loans with which the commercial department was burdened, there were constant transfers of cash from the savings department to the commercial department, without which the latter could not possibly have had enough cash for its necessities. The bank's doors were closed in September, 1920. Sundry

depositors sought to hold the bank commissioner as trustee because of the receipt of their deposits after the bank was insolvent, to the knowledge of its officers. It was found that the president, the treasurer, and the assistant treasurer, knew the bank was insolvent, but it was also found that

> "In accepting all the deposits the president and assistant treasurer 'acted under a hope' that the trust company 'would in some way or other pull through its difficulties and did not anticipate its closing. Though both these men knew the facts, * * * they never analyzed the situation.' There was no evidence showing on the part of either of these officers any personal fraudulent intent to bring about any gain or advantage for themselves by continuing to run the trust company and accept deposits, although, knowing the facts as to its condition, they knew it was insolvent."

It was held that upon such findings there could be no recovery. Stating the broad general rule that a bank which accepts deposits when it is "hopelessly insolvent" is guilty of a fraud which entitles the depositor to rescind the contract of deposit and hold the bank as trustee, the court said further:

> "On the other hand, simple insolvency, even of a bank, does not warrant the rescission of deposits if there are genuine and reasonable hope, expectation and intention on the part of the officers of the bank to carry on its business and to recover sound financial standing. To warrant such rescission there must be the further fact that it is reasonably apparent to its officers that the concern will presently be unable to meet its obligations as they are likely to mature and will be obliged to suspend its ordinary operation. The facts must

> establish the conclusion that the trust company accepted the deposit knowing through its officers that it would not and could not pay the money when demanded by the depositor."

There is the settled rule, and much temerity would be needed to say that the present case measures up to its requirements.

II.

Trust Fund Not Identified in the Hands of the Trust Company.

There is nothing new in plaintiff's brief respecting the identification of the trust fund—if one existed—in the hands of the Trust Company, save the assertion that the rule that there must be an augmentation of funds is only applicable where a preference over general creditors is sought by impressing a trust upon funds in a receiver's hands. Brief, pp. 3, 71.

That is a misapprehension of the theory upon which a recovery of a trust fund from third parties is permitted. To recover a trust fund it must be shown that the plaintiff's property, or its proceeds, has come into the defendant's hands, and that it is either retained by the defendant, or that defendant has received the benefit of it. There must, in other words, be an augmentation of the defendant's funds by reason of the receipt of the plaintiff's property. Manifestly this augmentation must be shown whether the third party is the receiver of a bank, who represents general creditors, or, as here, an independent third party who is

claimed to have received the trust fund prior to the insolvency of the bank. The principle is too plain to require more than statement.

III.

Conceding the Existence of a Trust Fund Coming Into the Hands of the Trust Company, there was Error in the Amount of the Recovery Awarded.

Under the preceding head we remarked the rule that it was essential to the recovery of a trust fund that it be traced into and identified in the hands of the person from whom recovery is sought. The rule is illustrated by two decisions of this Court: *Titlow vs. McCormick,* 236 Fed., 209, and *United States National Bank v. Centralia,* 240 Fed., 93. In those cases the trust funds had been deposited by the trustee banks with other banks and paid out on checks and drafts drawn by the trustees. It was held that the amounts so paid out could not be identified and so were not recoverable. In the present case, the account of the Central Bank with the Trust Company was overdrawn when the remittance in which was included the proceeds of the collection of plaintiff's check was received. The remittance paid that overdraft and left a balance to the credit of the Central Bank. Subsequently, but before the Trust Company was informed of the source from which the principal part of the remittance was derived, it paid a number of drafts drawn on it by the Central Bank, thus absorbing the major portion of the remittance. The District Court

refused to allow for and deduct from the recovery the amount of the existing overdraft and of the drafts subsequently paid, but awarded a recovery based upon the amount of the remittance as received.

Whatever disposition may be made of the preceding questions, that action was erroneous. It cannot be justified unless it is said that Buckholtz was an officer of the Trust Company, acting in its interest while he was with the Central Bank, and that therefore his knowledge of the source of the remittance, and of everything else which constituted it a trust fund, was as a matter of law imputed to his principal, the Trust Company, so that it knew when it received the remittance that the money did not belong to the Trust Company, could not be applied on its debts or paid out on its order, but must be held subject to the order of the owner. And such is the theory upon which it is sought to be justified.

The rule that "a bank is chargeable with knowledge acquired by its cashier, president, or other active officers pertaining to transactions within the scope of the bank's business" is well settled. 7 Corpus Juris, 530. It is otherwise stated "that knowledge acquired by or notice communicated to an officer or agent of a corporation while acting in his official capacity or within the scope of his duties will be imputed to the corporation." 3 R. C. L., 475. It is equally well settled, however, that "knowledge acquired by a bank officer in his private capacity and not while acting for and on behalf of the bank, and which was not communi-

cated to any other officer of the bank, is not imputed to it," *Id.*, 477-478, and that where a bank officer is also an officer of another corporation, knowledge acquired by him in the latter capacity will not be imputed to the bank. *Id.*, 479, 7 Corpus Juris, 534. Buckholtz' knowledge of matters which may be supposed to show the remittance to have been a trust fund therefore cannot be imputed to the Trust Company unless it is said that while he was in the Central Bank he was (1) an active officer of the Trust Company, (2) engaged in the discharge of duties pertaining to its business and (3) that he was not an officer or acting in the interest of the Central Bank, but solely for the Trust Company.

To bring the case within those requirements, plaintiff's counsel have evolved this theory: The relations between the Trust Company and the Central Bank were exceedingly close, so much so that the former could at pleasure impose its will upon the latter. A run began on the Central Bank in the first days of January which rendered its condition desperate. To secure the amount of its debt and save itself from loss, the Trust Company sent Buckholtz to Yakima to take charge of the Central Bank, keep it open as long as possible, and in the interim salve from the sinking hulk enough to pay the debt to the Trust Company. When Buckholtz went in Barghoorn went out, having nothing further to do with the Bank's affairs. Ellis remained as a figurehead, to disguise what was going on, but Buckholtz, representing the Trust Company,

was in complete control.

Greater credit could be given plaintiff's counsel for this ingenious theory if it were not so obviously adapted from *Dunlap v. Seattle Nat'l Bank,* 93 Wash., 568. There the Supreme Court of Washington denied recovery upon a very similar theory because there was nothing to sustain it but suspicion, based upon circumstances which were as consistent with honesty as dishonesty. There is no more to sustain the theory here advanced. Did space permit the putting of the isolated circumstances and fragments of correspondence upon which counsel build their theory into their appropriate place in the contexture of the entire transaction, the theory would merit and receive scant heed. As it is not permissible to deal with the matter at such length, it must be treated on broader grounds.

The "run" which—according to counsel—reduced the Central Bank to desperate straits and caused the Trust Company to put Buckholtz in charge of the Bank, occurred during the "first two or three days of January." (Tr., 94). Barghoorn and Buckholtz left Spokane on the 5th January and reached Yakima the morning of the 6th. (*Id.*) On the 5th, when, if counsel are right, the officers of the Trust Company decided that it would be necessary to put Buckholtz in charge of the Central Bank in order to save the debt the Bank owed the Trust Company, the account between the two banks stood thus: The Trust Company held the Central Bank's note for $20,000 (Tr., 90). This note was secured by a pledge of Liberty bonds

(Tr., 107). The Central Bank also had rediscounts with the Trust Company amounting to $119,000 (Tr., 85), and an overdraft of $38,000 (Tr., 87). If all the rediscounted notes were accounted worthless, so that the Trust Company would have no recourse save on the endorsement of the Central Bank, and the Liberty bonds were excluded from the calculation, the indebtedness of the Central Bank to the Trust Company was then $177,000. But it must be remembered that the testimony and the correspondence indicates that all the rediscounted notes then held by the Trust Company were, or were accounted to be, perfectly good. The difficulty in obtaining good notes for rediscount came later, toward the end of the month. The Liberty bonds, of course, made the $20,000 note of the Central Bank good. At that time, therefore, the only obligation of the Central Bank for which the Trust Company did not hold ample security, and about which it could have felt any concern, was the overdraft of $38,000. Now how went the account after this, when—say counsel—Buckholtz was in charge of the Central Bank, endeavoring to make the amount of its debt to the Trust Company out of it before it was forced to suspend? During the next few days the overdraft went up to $54,000, then disappeared to be replaced by a balance, then came back, a few thousands at a time, until it had again reached the peak at the time the Central Bank closed (Tr., 87). How, pray, is this reconcilable with counsel's theory? If Buckholtz was put in charge of the Central Bank on the 5th for the purpose of squeezing it dry before it was obliged to close, it

is evident that a $16,000 increase in the overdraft would not have been permitted. Most assuredly when the overdraft was extinguished and replaced by a credit, at one time of $21,000, during the middle of January, the Trust Company, if it had not seized the credit, would not have permitted it to be succeeded by an overdraft, mounting from day to day, until at the last it was at its peak. Then look at the rediscounts. On the 6th and 7th they amounted to $116,000; on the 8th they went to $163,000; on the 11th to $184,000; and from thence to the 24th, with some variations, to $192,000 (Tr., 85). This $73,000 increase in rediscounts, be it remembered, was notwithstanding the Trust Company was aware that many of the notes it was getting were not gilt-edged; that if good they were at least slow. The letters in which Triplett criticizes some of the notes sent for rediscount show that the Trust Company did not want the notes, and only took them to assist the Central Bank through what was regarded as a temporary cash shortage. (See Tr., 145-146, 163-164, 174, 199-200, 201-203, 207-209.) Again we ask, how is such an increase reconcilable with counsel's theory? If Buckholtz was put in charge of the Central Bank to get money out of it to pay its debt to the Trust Company, the debt would not have been permitted to increase as it did. And lastly we come to the $20,000 note secured by Liberty bonds. During the latter part of the month the Trust Company permitted the withdrawal of the bonds and took as security in their stead personal notes, slow, and many not paid at the time of trial (Tr., 107,

136-137). Does this release of unquestionable security and the acceptance of security which was slow, and might or might not be good, indicate that a looting of the Central Bank was then forward?

Summing up, then, we have this situation. On the 5th, when Buckholtz went to Yakima, the Central Bank owed the Trust Company an overdraft of $38,000, a note for $20,000 secured by Liberty bonds, and had rediscounted with it notes amounting to $119,000, which were or were supposed to be good, but on which it was endorser. The total obligation represented was $177,000, but all was well secured but the $38,000 overdraft. By the 25th, when, counsel say, the Trust Company had decided that the time had come to permit the Central Bank to be closed, the note remained in the same amount but was secured by personal notes instead of Liberty bonds, and the rediscounts had risen to $192,000, some of which were not rated highly. The overdraft, according to the books of the Central Bank, which contained entries of the $48,000 and the $51,000 draft, was $56,000 (Tr., 87). According to the books of the Trust Company, which showed the $48,000 credit but not the $51,000 debit, the Central Bank had a balance of $24,000 (Tr., 136). Excluding the $48,000 credit, so as to omit the Seattle National Bank transaction entirely, an overdraft of $24,000 would have appeared. Against the total $177,000 obligation when Buckholtz went to Yakima appears: (1) If the books of the Central Bank are taken, an obligation of $268,000; (2) If the books of the

Trust Company are taken, an obligation of $188,000; (3) If both credit and debt for the Seattle National Bank are omitted, an obligation of $236,000. However the figures are cast, the debt is much greater and the security much poorer than when Buckholtz went to Yakima. And in the face of this counsel say he was sent there to take charge of the Central Bank and milk it for the Trust Company's benefit!

Furthermore, counsel's theory must be judged by what was done not only, but also by what the Trust Company offered to do. The National City Bank of Seattle—the presiding genius of which is referred to in the letters as "Herb"—held the note of the Central Bank for $30,000, secured by Liberty bonds of an equal amount. Buckholtz wrote Triplett on the 21st that one of his plans for keeping up the cash reserve, if it became necessary, was to get Herb to take real estate contracts and mortgages as security in the place of the Liberty bonds, thus releasing the latter for sale (Tr., 221). Triplett replied on the 24th, approving of the idea and suggesting that it be broached to Herb, who, he thought, 'ought to be willing to do that much for you." In the event that he declined, however, Triplett recommended that the bonds be sold to Herb, giving the Central Bank $30,000 in cash, and the Trust Company would take over the $30,000 obligation if secured by "good but slow" paper; *i. e.*, "paper which although it will ultimately be paid cannot be liquidated from so-called quick assets." (Tr., 225-226). The rapid march of events after this offer was made prevented

any actoin being taken on it, but its good faith is beyond question, and it dispels any notion that the Trust Company, through its representative, Buckholtz, was then engaged in squeezing every penny it could from the Central Bank before its inevitable failure occurred.

Again, when the bank examiner was endeavoring on the 26th and 27th to procure financial assistance from the Yakima bankers, so that the Central Bank would not need be closed, he called up some outside banks, among others the Trust Company, to see if they would aid. The Trust Company agreed to advance $15,000, and on a second call, when it was said a larger sum would be necessary, it raised the amount to $20,000 (Tr., 58). This came to nothing because the Yakima banks "kind of petered out' (*Id.*), but the agreement of the Trust Company to advance $20,000 to a fund sufficient to put the Central Bank on its feet forbids that counsel's theory be accepted.

Along with the foregoing suggestions goes this thought. The Trust Company received the $48,000 remittance from the Central Bank on Saturday, the 22nd. It extinguished an overdraft and gave the Central Bank a credit of some $38,000 (Tr., 111). (According to the books of the Central Bank, after deducting a $16,000 overdraft, the credit would have been around $32,000). (Tr., 42). On the 22d the Central Bank sent a cash remittance of $2,500 to the Trust Company; on the 24th, of $4,000; and on the 25th, of $7,000 (Tr., 139-140). On the 22d it sent for rediscount notes amounting to $500; on the 24th, of $6,500,

and on the 26th, of $5,000 (Tr., 139). Adding these remittances for credit to the credit remaining after extinguishment of the overdraft by the $48,500 remittance, the Trust Company would have had $63,500 to apply to the debt of the Central Bank had it refused payment of the drafts drawn upon it by the Central Bank and presented between the 22d and the 25th. That it did not refuse such payment, but paid all drafts presented until there remained, on the morning of the 25th, a credit to the Central Bank of but $24,682, certainly shows that it had no thought of taking advantage of the Central Bank or its creditors.

An essential part of counsel's theory is that Buckholtz was placed in complete control of the Central Bank, Barghoorn dropping out entirely and Ellis remaining as a mere figurehead. That is proven untrue by the testimony of Barghoorn and Ellis, without reference to Buckholtz' testimony, which is also flatly contradictory of it. Barghoorn testified that after Buckholtz became connected with the Central Bank Ellis was running it and that Buckholtz had no official position; that the duties assigned to Buckholtz were to look after the rediscounts with the Trust Company, the financial statements, and the making of collections on the notes; that Ellis was too easy in enforcing payments and Buckholtz was put in charge of collections with directions to enforce payments as fast as he could without doing harm, and that Ellis was supreme in his province and Buckholtz in his (Tr., 50-51). Ellis testified that Buckholtz was handling

the rediscounts for the Trust Company; that he (Buckholtz) and Ellis would go through the notes daily, selecting and classifying them and getting out history sheets; that Buckholtz didn't have charge of the whole of the credit department, but that he (Ellis) and Buckholtz had charge of it jointly, and that he and Buckholtz consulted daily concerning the important transactions of the bank (Tr., 95, 97). This testimony, which, of course, cannot be questioned, merely confirms Buckholtz' testimony that all that he had to do with the business of the Central Bank was to inform himself concerning the paper, select paper for rediscounting with the Trust Company, and enforce collections (Tr., 128). It is confirmed also by Buckholtz' letters written at the time.

Another essential part of counsel's theory is that the sending of Buckholtz to Yakima was a hurried decision, forced by the crisis caused by the run on the Central Bank, and not thought of until the 25th, the day Buckholtz left. It is true that the decision that *Buckholtz* should go to Yakima was not reached until the 25th, but the further implication which counsel would make, *viz.*; that there had been no thought of sending anyone from Spokane to go into the Central Bank until that date, is utterly untrue. The State bank examiner testified that in December he talked with Barghoorn about getting someone to take Ellis' place, and that Barghoorn had agreed that he would do so as soon as he could get a suitable man to take the place, saying that he had been talking to various

bankers about "trying to get a man that would measure up to the required standard" (Tr., 63). Mr. Rutter testified that in the latter part of 1920 Barghoorn said it was necessary to get a man to succeed Ellis, and that he negotiated with one Richards, an employe of the Trust Company, who went to Yakima and, after looking over the situation, decided not to take the place, and that thereafter Barghoorn consulted with him (Rutter) from time to time about various prospects until finally Buckholtz was selected (Tr., 121). This testimony is confirmed by Triplett, who testified that Barghoorn talked with him several times about a man to take Ellis' place and that he (Triplett) sent several men to Barghoorn who did not suit him, until finally Buckholtz was sent (Tr., 101). And Barghoorn testified that when he employed Buckholtz to go to Yakima it was understood that if Buckholtz proved efficient he would take Ellis' place as soon as the change could be made "without making trouble" (Tr. 50).

Counsel make much of the fact that the reason for Buckholtz being in Yakima was not made public, and that in one of his letters Buckholtz said no one knew why he was there, but supposed that he was merely taking "Van's" place, "Van" being a former employe of the Central Bank. Barghoorn's testimony shows why it was intended that the reason for Buckholtz being in the bank should not be known. The Central Bank, like all other small banks with insufficient liquid assets, was going through a critical period, for the deflation period was a trying time for all banks. Be-

cause of the insistence of the State Banking Department, he was endeavoring to select a man to take Ellis' place. While the officers of the Trust Company, who had long known Buckholtz, had no doubt that he would prove a suitable man for the place, Barghoorn, who had no personal acquaintance with Buckholtz, or at least no intimate knowledge of his qualifications, was not so sanguine. He therefore employed Buckholtz to take Ellis' place only on the condition that he should have it "if he proved efficient" (Tr., 50). While determining whether Buckholtz was qualified to take the place, Barghoorn, of course, did not desire to lose Ellis or to have Ellis' efficiency impaired by the knowledge that Barghoorn intended to get someone to take his place and was trying out Buckholtz with that end in view. Barghoorn told Buckholtz, therefore, that there was no definite time when he could expect to take Ellis' place; that the change would come "sooner or later * * * as soon as it could be done without making trouble" (Tr., 50). Yakima is a small town, and naturally Buckholtz would have to be very guarded as to the understanding under which he was employed to keep it from Ellis' ears.

Stress is laid upon one of Buckholtz' letters in which he gives a list of collateral "to assist Mr. Blake in checking up collateral" which he said was in his possession "as agent for the Spokane & Eastern Trust Company." The fact that Buckholtz was personally intrusted with sundry collateral and rediscounted notes of the Trust Company was one concerning which no

bones were made, either at the time or afterward, Triplett and Buckholtz both testifying that for the accommodation of both the Central Bank and the Trust Company, and for facilitating the financial transactions between them, it was agreed that the Trust Company would send to Buckholtz personally—not to Ellis nor to the Central Bank—the collateral and rediscounted paper as its due date approached, so that collections could be made or renewals had if that were necessary (Tr., 102-103, 127). This arrangement was known to Barghoorn, and was one to which he had no objection (Tr., 49).

One Hay, at one time a State bank examiner, testified concerning a remark made by Mr. Rutter at a meeting of the State Guaranty Board in the Governor's office at Olympia during January. The remark, if it were as unqualified as counsel put it in their brief, might have some evidentiary weight. According to that, Mr. Rutter said: 'We have a man over there who is looking after things and things are coming along very nicely." The witness, however, qualified that by adding the words "or something to that effect" (Tr., 70). Fairness would seem to require that these qualifying words should have been added to the quotation from the witness' testimony. This testimony was given a year after the alleged conversation occurred, and of course no witness who would be entitled to any credit would attempt to state positively what was said in a casual conversation, particularly when the witness had no interest in what was said, as this witness evi-

dently had not in what Mr. Rutter said. Mr. Rutter testified that he remembered the occasion referred to, that the Governor said something about a draft having been turned down, and Mr. Rutter said he didn't think that possible, that Mr. Buckholtz was working there, and that he explained to the Governor who Buckholtz was, that he was a good man, etc., but that whatever form of expression he may have used he did not intend to convey the idea that Buckholtz was over there as a representative of the Trust Company for he had no such thought in his mind (Tr., 123).

During the oral argument, plaintiff's counsel, pressing his theory that the Trust Company was in complete charge of the situation and determined how long the Central Bank should remain open and when it should close, conveyed the impression, in language which is not precisely recalled by the writer, that on the 25th an officer of the Trust Company telephoned from Spokane to Mr. Ross, the vice president of the Central Bank, at Yakima, that the Bank should be closed. That some such impression was conveyed to the Court was suggetsed to the mind of the writer by the fact that His Honor, Judge Hunt, immediately inquired who this officer was, to which counsel replied that it was Mr. Rutter, the president of the Trust Company. Now all there was to the circumstance referred to was this: On the morning of the 25th, Mr. Rutter and Mr. Triplett received letters from Buckholtz telling of the outstanding $51,000 draft, and that a heavy overdraft would be necessary if it were

paid, which, if allowed, would far exceed the limit of the credit at any time theretofore extended to the Central Bank. Thereafter, at some time during the day, the Executive Committee was called together, counsel for the Trust Company was called in, and it was decided not to allow the overdraft which would be necessary to pay the draft. As soon as the officers of the Trust Company could get in touch with Mr. Barghoorn, which was not until late in the afternoon, that decision was conveyed to him (Tr., 109, 122). Mr. Ross testified that he received a telephone message from Mr. Rutter just before dinner; that in this message Mr. Rutter said that Barghoorn was with him and had asked him to call up Mr. Ross, request him to get hold of Buckholtz, and get some of the Yakima bankers together to discuss matters relative to the Central Bank; that all that Mr. Rutter said was that he understood rumors about the Central Bank were in circulation and that the Yakima banks ought to get together to help the institution out; that Buckholtz had the run of things and could explain the situation to the Yakima bankers; that Mr. Barghoorn would be down the next morning (the 26th) and discuss the matter with the Yakima bankers, and that something would have to be done by the Yakima banks to keep the Central Bank from having some trouble. There was nothing more definite than this in the telephone message, and in compliance with it the witness arranged for certain Yakima bankers to discuss the matter that night and later on the next morning with Braghoorn (Tr., 67-69). It certainly requires

an unrestrained imagination to make out of this effort of Mr. Rutter's, undertaken at Mr. Barghoorn's request, to do something to avert trouble for and the closing of the Central Bank, a direction that the Central Bank must be closed.

It is claimed, however, that assuming that Buckholtz was not an officer or agent of the Trust Company whose knowledge would be imputed to it as matter of law, that as matter of fact Buckholtz communicated by telephone to the officers of the Trust Company on the 21st the origin of the $48,000 remittance and the fact of the outstanding $51,000 draft, whereby, disregarding any fiction of law, they were actually informed of the fact that the remittance was a trust fund. This claim is based entirely on the testimony of one Miner, an officer of the Seattle National Bank who went to Yakima on the 27th January in plaintiff's interest and there saw and talked with Buckholtz. This witness was extremely partisan, as will be observed by the mere reading of his testimony. It is perhaps natural that he should be so, since plaintiff is obviously a valued customer of the Seattle National Bank, and that bank must have felt in some degree morally responsible for the loss caused plaintiff by the bank's bad judgment in the selection of a collecting agent. Miner, on his direct examination, strongly gave the impression that Buckholtz had told him that on the 21st he (Buckholtz) called up the officers of the Trust Company and told them the facts concerning the draft. On cross examination, however, he ad-

mitted that Buckholtz did not tell him when he (Buckholtz) told the officers of the Trust Company about the draft, and that it was simply the witness' inference that the conversation occurred on the 21st. He finally admitted that all that Buckholtz said was that he had talked with Mr. Triplett about the draft by long distance, and that no information was given to the witness as to what he said, as to what Triplett said, or as to how much, if any, information was given concerning the draft (Tr., 75-76). Buckholtz denies that he told Miner anything of the sort and says that he did not telephone the Trust Company anything about the draft, and that the only information he gave concerning it was contained in the letters which he wrote to Mr. Rutter and Mr. Triplett on the 23d and the 24th respectively, these being received by them on the morning of the 25th (Tr., 131). This testimony is confirmed by the manner in which he spoke of the draft in this letter. He said to Mr. Rutter in the letter:

> "Yesterday, we mailed a $51,000.00 draft on you to the Seattle National Bank covering a large letter of items on other local banks, the net of which has been remitted to you and no doubt we will have a few dollars there to meet it. The draft will likely reach you Tuesday or Wednesday and if you pay it the overdraft created will be the limit to date of credit advanced this institution. Have Mr. Triplett ascertain the amount of the overdraft created if this draft is paid. If you do not pay it we are gone." (Tr., 231-232).

It is obvious that if Buckholtz had theretofore informed the officers of the Trust Company by telephone of the facts concerning this draft, he would not have spoken

of it and described it in such detail in his letter. It exceeds likelihood that he would have thought it necessary to again mention it at all, but if he had his expression certainly would have been something like this: "The draft about which I telephoned you will probably reach you Tuesday or Wednesday, and if you do not pay it, the bank will have to close." Triplett testified that the letters gave him the first information he received concerning the draft (Tr., 108-109, 119).

In disposing of the question now presented, the Court is required to choose between two theories. The first is that propounded by plaintiff, sinister in aspect and requiring the finding of fraud and perjury committed by gentlemen who stand high in the community and are of unimpeachable character. That theory requires that it be held that because of some peculiarly intimate relation between the Central Bank and the Trust Company, the Trust Company undertook to carry the insolvent Central Bank, whereby a heavy indebtedness to the Trust Company was incurred. It requires that it be held that a crisis was created by a run upon the Bank early in January, and that to deal with the situation the Trust Company virtually took over the Central Bank, placed Buckholtz in charge of it, and that its purpose in doing so was to extract as much money as it could from the Central Bank before its inevitable failure occurred, and that it chose the moment for the closing of the Central Bank, and chose it because at that precise moment it could permit the Central Bank to be closed with the greatest profit to itself.

On the other hand is the theory which we propound. It is supported by the testimony of the state bank examiner, by the positive testimony of Mr. Barghoorn, of the officers of the Trust Company, and of Buckholtz. It is supported clearly and unmistakably by the correspondence between Buckholtz and officers of the Trust Company if that correspondence is read as a whole and isolated scraps of it are not relied upon. That theory is that the Central Bank, although a small bank and with insufficient liquid assets, was nevertheless a solvent institution and would have continued so had it not been for the beginning of the deflation period in 1920. That critical period caused it embarrassment, as it did every other bank, especially those whose assets were not of the liquid sort. Considering the extent of the deflation which occurred and the period for which it continued, it is evident that the Central Bank could not have survived as long as it did if it had not had outside assistance. In that it was not singular. Many other banks were in the same condition, and many other banks besides it failed although they received outside assistance. Nor was there anything singular in the aid which was extended to the Central Bank by the Trust Company. It was such aid as the Trust Company was extending to many other small banks which were its correspondents, and with whom it could not be said there was any closer relationship than that of correspondents. In that theory, Buckholtz' connection with the Central Bank is a mere incident. He was there primarily because the State Banking Department had requested a change

in managers, and secondarily to aid in the enforcement of collections and the selection of rediscounts which would be satisfactory to the Trust Company. He was neither agent nor employe of the Trust Company in any other sense, than that for the accommodation of the Central Bank as well as the Trust Company, and for the facilitation of the extension of financial assistance, he was entrusted by the Trust Company with collateral and rediscouned notes as they approached maturity so that they could be the better collected or renewed, as the case might be. The closing of the Central Bank was not dictated by the Trust Company, neither did it result from any improper or unfriendly motive on the Trust Company's part. It was caused by the fact that the deflation period was more acute and continued longer than was expected, that the officers of the Central Bank did not take sufficient account of its situation, and that its assets were not of the liquid character which was required if it was to be carried through the critical period. To the last the attitude of the Trust Company to the Central Bank was of the utmost liberality. On the 24th, but three days before the Central Bank was obliged to close its doors, the Trust Company offered to advance an additional $30,000 if the Central Bank could give it security. The feeling toward the Bank is expressed in unmistakable terms in that letter. It is that the Trust Company was "willing and ready to stand back of the institution (Central Bank) to a reasonable extent," and that its feeling was "the most friendly in the world and we are willing to do every-

thing we can as long as the stuff is reasonably good," and required nothing more than that it should be furnished with notes for rediscount which, albeit slow, could be accounted good. Its attitude is further shown by its agreement on the day before the Central Bank closed, at the request of the bank examiner, to advance $20,000 without security if other banks would contribute with it to a fund sufficient to put the Central Bank on its feet. The theory is, in short, that the good faith of the Trust Company in its dealings with the Central Bank is beyond reproach, and that it went as far as any bank could be reasonably expected to go and farther than most banks would have gone in its endeavor to pull the Central Bank through.

There ought not to be much doubt which of these two opposed theories will be adopted. In support of the theory which we propound are positive testimony and evidentiary circumstances of the most compelling character. In support of the theory which plaintiff's counsel propound are nothing but circumstances and expressions of which the utmost that can be said is that they are equivocal, and if considered from the viewpoint of suspicion, engender an impression that there might have been bad faith and fraud in the transactions between the two banks. Your Honors are not warranted in accepting plaintiff's theory upon such evidence. Plaintiff is required to prove fraud to sustain its case, and to prove fraud the evidence must be clear, unequivocal and convincing. It cannot be inferred from "facts and circumstances lawful in themselves and

consistent with an honest purpose." The settled rule is that "slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud." *Dunlap v. Seattle Nat'l Bank,* 93 Wash., 568, *Foster v. McAlester,* 114 Fed., 145. We submit that no finding of fraud in this case is justified, and that the Court is required to accept the unimpeached testimony of Messrs. Barghoorn, Rutter, Triplett and Buckholtz regarding the relations between the Central Bank and the Trust Company and the position of Buckholtz with respect to them, especially in view of the confirmance of the correspondence. That being so, whatever may be held with respect to the existence of a trust fund, or its identification in the hands of the Trust Company, nevertheless the Trust Company cannot be held for anything more than the amount of the remittance which remained in its hands on the morning of the 25th of January when its officers were advised by Buckholtz' letters of the origin of the remittance.

Respectfully submitted,

F. H. GRAVES
W. G. GRAVES
B. H. KIZER,

Solicitors for Appellant.